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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO PEREZ,

Defendant and Appellant.

D073137

(Super. Ct. No. SCD230265)

ORDER MODIFYING OPINION  
AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on May 31, 2019, be modified as follows:

1. On page 9, following the "DISCUSSION" heading, the heading numbered "II." is changed to "I." so it reads:

I. NO ERROR IN ADMITTING PRIOR DOMESTIC  
VIOLENCE EVIDENCE.

2. On page 14, following the first full paragraph, the heading numbered "I." is changed to "II." so it reads:

II. DIANA'S STATEMENT QUALIFIED AS AN EXCITED  
UTTERANCE

There is no change in the judgment.

Appellant's petition for rehearing is denied.

McCONNELL, P. J.

Copies to: All parties

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(Super. Ct. No. SCD230265)

APPEAL from a judgment of the Superior Court of San Diego County, Frederick L. Link, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

Armando Perez admitted killing his wife, Diana, claiming that he "lost it" after she told him that she did not love him and would never see his daughter again. A jury

rejected his argument that they should find him guilty of voluntary manslaughter and convicted him of first degree murder (Pen. Code, § 187, subd. (a)) by means of lying in wait (Pen. Code, § 190.2, subd. (a)(15)) and by personally using a knife (Pen. Code, § 12022, subd. (b)(1)).<sup>1</sup> The trial court sentenced Perez to life in prison without the possibility of parole, plus one year for the knife enhancement.

Perez appeals, contending: (1) the court denied him due process of law by admitting prior domestic violence evidence without excluding a rape allegation, (2) the court erred by admitting Diana's hearsay statements to her mother because the statements did not qualify as excited utterances, (3) the cumulative effect of the evidentiary errors warrants reversal of his conviction, (4) the prosecutor erred and lessened her burden of proof by misstating the law of voluntary manslaughter and the jury's duty under the "beyond a reasonable doubt" standard, and (5) the denial of multiple challenges for cause during voir dire substantially disadvantaged the defense and resulted in a biased venireperson serving as an alternate juror. We reject his assertions and affirm the judgment.

## FACTUAL BACKGROUND

### *Perez's Relationship with Diana*

Perez met Diana when she was 16 or 17 years old. At the time, he was about 18 years older than Diana and separated from his wife, with whom he had two children.

When Diana turned 18 years old, she told her mother that she was dating Perez. Diana

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<sup>1</sup> Perez initially pleaded guilty to the charges, but we reversed his conviction because he was not represented by counsel at the time of the plea. (*People v. Perez* (July 27, 2016, D067675) [nonpub. opn.] )

became pregnant soon thereafter. Perez finalized his divorce from his first wife and married Diana.

In April 2010<sup>2</sup> Diana called her mother and asked if she could "come and get [her.]" Diana took her baby daughter and moved in with her parents. En route to her parent's house, Diana received a text from Perez, which read: " 'Think very well about what you're going to do. You might—might be sorry later on. Think about your family and your daughter.' " Diana had a large bruise on her back and bumps on her head. Diana reported the incident to the police. Diana was crying and fearful when she spoke to police. A few weeks later, Diana and the baby returned to Perez. The family then moved in with Perez's mother.

In June or July Diana's sister noticed that Diana had a "busted lip" and a bruise under her eye. When she asked Diana what had caused the injuries, Perez interjected and claimed he had accidentally bumped heads with Diana on a ride at the fair. After this, Diana and her daughter moved back into her parents' home. Diana also began attending classes at San Diego City College (SDCC).

Although Perez was not enrolled at SDCC, he attended Diana's classes and sat next to her. Diana's professors described her as quiet, shy and timid. At times, Perez spoke for Diana. One professor described Perez as overprotective and always around Diana. Other students described Perez as "overprotective" and "overly jealous."

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<sup>2</sup> All further date references are to 2010.

On September 23 Diana reported a domestic violence incident to police. A detective interviewed Diana and audio recorded the interview. The detective noted that Diana "was nervous, apprehensive, scared." The jury listened to the recorded interview.

Diana told police that on September 21 she drove her mother's car to school. After learning that her class had been canceled, Diana walked back to her car and encountered Perez. When Diana got into her car to leave, Perez choked her until she lost consciousness. When she awoke, she was in the passenger seat. Perez told Diana that he was taking her to a motel. Perez parked the car near the check-in office where he could watch the car. Diana looked for her cell phone, but realized that Perez had taken it. When they got in a room, Perez told her to wash her face and to give him her clothes because she had urinated on herself. Diana noticed that her face had red spots from being choked.

When Perez took her clothes to wash them, Diana wanted to call someone, but the handset to the telephone was disconnected and the wire was missing. Perez later allowed Diana to use her cell phone to call home. Diana had intercourse with Perez. She told police that she felt that she had to and that Perez would get angry and do something else to her if she did not.

The couple argued when Perez told Diana that she could not leave. Perez pushed her onto the bed and she got scared that he would hit her. The couple left the following morning. After driving Diana around, Perez took her to a second motel. Diana pushed Perez away when he started to get intimate with her. Perez got angry and told her that that he would "get crazy" if she did not stop pushing him away. Perez then forced

Diana's legs open and had intercourse with her. Diana told police that Perez had forced himself on her in the past.

The next day, Diana convinced Perez to take her home by telling him to purchase some makeup to put on her face. Perez took her back to where he had parked his car and gave Diana the keys to her car and her cell phone. He then followed her home in his car. When she got home, Perez was already outside. Diana walked into the house with Perez following her. Her mother was very angry and told Perez to leave. Diana went to the bathroom. She came out after Perez left and told her mother what had happened. Diana called the police and waited for them to arrive.<sup>3</sup>

That same day, a forensic nurse examined Diana. Diana's injuries included bruises and petechiae on her face, in her eyes and behind her ears from strangulation. During the examination, Diana could not make eye contact, was quiet and started sobbing at one point.

Police arrested Perez and interviewed Diana again. Diana, however, did not want the interview to be recorded. Diana admitted her family did not know that she had been seeing Perez and having sex with him after their break-up in July. Diana claimed that she did not love Perez and did not want to be with him, but that she was afraid of what he

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<sup>3</sup> For ease of reference, we refer to the evidence of these prior acts of domestic violence as the April incident, the June incident and the September incident (collectively the three prior incidents).

would do to her if she stopped having sex with him. Diana otherwise confirmed the major details of her previous account.<sup>4</sup>

The San Diego County District Attorney's Office declined to file charges against Perez. When informed of this decision, Diana indicated that she wanted to pursue a restraining order. On September 28 Perez was served with the restraining order prohibiting him from contacting Diana and barring him from her home, work and school. In October Perez told his sister's boyfriend that he struggled with jealousy and wanted to choke his girlfriend if he saw her with another person. Perez also stated that he wanted to " 'kill someone' " and " 'kill a girl.' "

#### *Diana's Murder*

After the September incident Perez stopped attending Diana's classes. Diana referred to Perez as her "ex" and told a student that he was "crazy." During this time, Diana began a friendship with an African-American student named Verne. The two called each other a few times but never dated, kissed, or were intimate.

On October 12 Diana's father dropped her off at school with plans to pick her up at about 9:40 p.m. Around 6:50 p.m. Diana spoke briefly with Verne before her class started. Another student saw Diana speaking with an African-American student before class and stated that the two individuals did not kiss or have any physical contact.

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<sup>4</sup> At trial, a clinical forensic psychologist testified regarding intimate partner violence. He explained that victims stay in abusive relationships for many reasons, including fear, financial dependence, shame, emotional attachment, and to keep a family intact. A majority of victims also recant or "dial back" some of their initial allegations for many of the same reasons that they stay in abusive relationships.

Around 7:00 p.m. an SDCC dean saw Perez running through the school's parking lot. Several students later saw Perez in a tree near Diana's classroom. Around 8:20 p.m. a student saw Perez pacing in the school's quad area. About 15 minutes later, a student saw Perez attempt to buy a homeless man's shirt for \$5. Around 8:55 p.m. Verne spoke with Diana for a few minutes outside her class. At 9:00 p.m. another student who left class early saw Perez and assumed that he was waiting for Diana. When Diana's class let out at about 9:35 p.m., students saw Perez running around, looking at the classroom and hiding behind trees. Two students later saw Perez with his arm around Diana.

Diana did not appear when her parents arrived at SDCC to pick her up. When Diana's father called her, he heard voices on the other end and a male voice saying the word "fuck." At some point, Diana's parents decided to leave campus, return home and report Diana as missing.

In the meantime, at about 10:00 p.m., a student entered the men's bathroom. He noticed that the bathroom lights were off and that a trash can blocked the door. He turned on the lights and found Diana's body lying face down in a pool of blood. Her pants and underwear had been pulled down around her knees.

An autopsy revealed that Diana had been stabbed and cut at least 39 times. Before her death, Diana suffered multiple stab wounds to her neck, left side of her chest and face. The neck and chest wounds killed her. After her death, Diana's right nipple was severed, her left areola partly sliced off, she was stabbed seven times in the vagina, perineum, and anus, and the word "bitch" was carved into her back.

### *Perez's Testimony*

In April Perez took Diana to a club. Perez pushed Diana into a wall when he observed her getting too close to the DJ. Perez admitted that this was the first time he had been physically violent with Diana. In June or July Perez admitted another domestic violence incident where he pushed Diana's head while arguing. On another occasion, Perez admitted that he hit Diana in the face causing her lip to swell.

Perez claimed that on September 21 he saw Diana talking to an African-American man. After the man ran away, Diana suggested they have sex in the back of her car. She then asked him to get a motel room. Perez claimed that at the motel, Diana made him choke her and pull her hair during intercourse. After some "rough sex," the couple discovered that Diana had red spots around her eyes from being choked. The next day they checked into a second motel and had more sex. The following day they separately drove to Diana's parents' home, but her family would not let him explain what had happened.

On October 12 Perez went to SDCC to talk to Diana, despite the restraining order prohibiting such contact. Because the classroom door was closed, he climbed a tree to confirm that Diana was in class. He later saw Diana come outside and start hugging and kissing an African-American man. Perez became so upset that he experienced trouble breathing. He ran toward the trolley and stopped when he saw a glass window with knives. He went inside and asked an employee to show him a knife. He ran out with the knife intending to confront the African-American man.

He spoke with Diana and told her that he wanted to see his daughter. He then headed back to the trolley station when he remembered that he had some money for the baby, so he ran back to give it to Diana. He saw Diana with "a black guy" as they walked toward a bathroom. He saw them kissing and yelled, "[W]hat the fuck?" After the man ran away, he and Diana went inside the bathroom.

He claimed that Diana started kissing him when he asked to see his daughter and told her "to stop all this stuff that you're doing." Diana then grabbed his hand and put it down her pants so he could sexually stimulate her. She then pushed his hand away and told him, "That guy does it—that guy will fuck me better." He "lost it" when Diana told him that she did not love him and that he would never see his baby again. "And next thing you know, I see her on the floor, and there was a whole bunch of blood everywhere." Perez did not remember washing his hands, but remembered that he took his shirt off and threw the knife away. He took the trolley home, stole a car, drove to see his other children, and fled to Mexico. He hid in Mexico for nearly a year and a half and was eventually arrested in Tijuana.

## DISCUSSION

### II. *NO ERROR IN ADMITTING PRIOR DOMESTIC VIOLENCE EVIDENCE*

#### *A. Additional Background*

The People moved in limine to admit evidence of the three prior incidents of domestic violence under Evidence Code<sup>5</sup> section 1109. At the hearing on the motion, the prosecutor argued that the three prior incidents were relevant because they comprised a

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<sup>5</sup> Undesignated statutory references are to the Evidence Code.

series of connected domestic violence incidents within a six-month period that culminated with the homicide. The court found the evidence admissible under section 1109 and overruled defense counsel's objection under section 352. At trial, the jurors heard evidence about the three prior incidents. (*Ante*, Factual Background.)

### B. *General Legal Principles*

Evidence of prior criminal acts is generally inadmissible to show a defendant's disposition to commit such acts. (§ 1101, subd. (a).) An exception to this rule exists for cases involving domestic violence. (§ 1109, subd. (a)(1).) Section 1109 provides, in relevant part, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (§ 1109, subd. (a).) In enacting section 1109, the Legislature "considered the difficulties of proof unique to the prosecution of [domestic violence cases] when compared with other crimes where propensity evidence may be probative but has been historically prohibited." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333-1334, fn. omitted.)

Evidence admissible under section 1109 is subject to exclusion under section 352 if the probative value of the evidence is substantially outweighed by a danger of undue prejudice. (See *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095.) "The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with

"damaging." ' ' ' (*People v. Karis* (1988) 46 Cal.3d 612, 638.) " '[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

"The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) " ' "[T]he record must affirmatively show that the trial judge did in fact weigh prejudice against probative value," ' ' ' (*People v. Clair* (1992) 2 Cal.4th 629, 660), but " '[n]o more is required.' " We review the trial court's exercise of discretion in declining to exclude evidence under section 352 for abuse and will not disturb the court's ruling "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

### C. *Analysis*

Perez claims that admitting evidence under section 1109 violated his due process right to a fair trial and requests that we reexamine case law to the contrary. Specifically, he asserts that section 1109 abandoned centuries of precedent and that section 352 provides an inadequate safeguard to such evidence rendering a trial unfair.

As a preliminary matter, we conclude that the trial court did not abuse its discretion in admitting evidence of the three prior incidents under section 1109 or declining to exclude this evidence under section 352. Additionally, we note that Perez did not object to the admissibility of the section 1109 evidence on constitutional grounds below. To preserve an evidentiary challenge for appeal, a defendant must make a timely objection at trial, "so stated as to make clear the specific ground of the objection"; otherwise, the claim is forfeited. (§ 353, subdivision (a); *People v. Holmes* (2012) 212 Cal.App.4th 431, 435-436.) Because Perez never objected to the admission of section 1109 evidence on constitutional grounds, he forfeited this claim on appeal.

In any event, even if the issue had been preserved, California courts have consistently rejected similar challenges. As Perez acknowledges, our Supreme Court denied a due process challenge to section 1108, a parallel provision involving evidence of prior sexual offenses. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*)). Rejecting the defendant's argument that section 1108 violates due process principles by allowing admission of propensity evidence, the *Falsetta* court concluded that "in light of the substantial protections afforded to defendants in all cases to which section 1108 applies, we see no undue unfairness in its limited exception to the historical rule against propensity evidence." (*Falsetta*, at p. 915.)

Numerous appellate courts, including this one, have applied the California Supreme Court's reasoning in *Falsetta*, *supra*, 21 Cal.4th 903 to section 1109 and rejected similar due process arguments. (See, e.g., *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704 [statute satisfies due process]; *People v. Jennings* (2000) 81

Cal.App.4th 1301, 1310 [constitutionality of section 1109 under due process clauses of federal and state constitutions "has now been settled"]; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420 [section 1109 does not violate defendant's right to due process].) We likewise reject the argument.

Perez next argues that Diana's statements to police that she had been raped should have been redacted from the recorded interview as unduly prejudicial under section 352.

During her recorded interview, Diana stated that she had consensual sexual intercourse with Perez on the first night, but asserted that she felt she "had to" and she "let him" have sex with her "because [she] thought that [she needed to] for him to let [her] leave and not do anything stupid anymore, like choke me again." The couple then had sex a second time. Although Diana tried to push him off and struggled with him, Perez held her down and forced her legs open. She "gave up" her struggles when Perez told her that he would "get crazy." When asked if she felt that she had been raped, Diana replied "In a way, yeah, because he's, he's done it in the past."

The trial court did not abuse its discretion in declining to exclude this evidence under section 352. The evidence was probative of Perez's propensity to commit acts of domestic violence against Diana. Presenting the evidence consumed little time and had little risk of misleading the jury. The court instructed the jury with CALCRIM No. 852, which told the jurors, even if they decided defendant committed these uncharged acts, that evidence was only one factor to consider along with all the other evidence in deciding whether the People had proved the charged incident beyond a reasonable doubt. Additionally, the instruction told the jurors that the prior acts evidence was insufficient

alone to show Perez's guilt of the charged offense. We presume the jurors followed these instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 746 (*Edwards*).)

Although the evidence was damaging to Perez, it was not overly prejudicial. The evidence was not particularly inflammatory and was far less inflammatory than the testimony concerning the charged offense. Accordingly, we reject any claim that the evidence should have been excluded under section 352. Moreover, even if the evidence of Perez forcing Diana to have sexual intercourse during her kidnapping had been redacted, the jury would have still learned that Perez had committed other acts of domestic abuse against Diana. Accordingly, we reject Perez's argument that the trial court abused its discretion in admitting this evidence.

#### *I. DIANA'S STATEMENT QUALIFIED AS AN EXCITED UTTERANCE*

##### *A. Additional Background*

The People moved in limine to admit Diana's statement to her mother that on September 21 Perez had kidnapped her, strangled her, and held her against her will until he decided to return her on September 23. The defense requested a section 402 hearing to determine whether Diana's statements to her mother were admissible under the hearsay exception for an excited or spontaneous utterance. The court denied the request for a section 402 hearing.

At trial, Diana's mother testified regarding Diana's return home after her unexplained absence from September 21 to 23. Diana arrived home and her mother told her to go to her room because she was angry at Diana. Perez then knocked on the door,

but Diana's mother told him to leave. After Perez left, Diana came out of the bathroom, crying.

When the prosecutor asked Diana's mother if Diana disclosed what had happened, defense counsel objected on hearsay grounds. The court overruled the objection. Over a continuing hearsay objection, Diana's mother then testified that Diana told her that Perez had strangled her in the car until she lost consciousness and that she had urinated on herself. Perez took away her cell phone and brought her to a hotel, restrained her and threatened to rape her. Diana reported the incident to police.

### *B. General Legal Principles*

"Hearsay . . . is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) Hearsay evidence is inadmissible unless otherwise provided by law. (§ 1200, subd. (b).) Under the excited or spontaneous utterance hearsay exception, hearsay testimony is admissible if it "(a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." (§ 1240.)

"To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers

to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' " (*People v. Poggi* (1988) 45 Cal.3d 306, 318 (*Poggi*).) "When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. [Citations.] But . . . [n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*' " (*Id.* at p. 319, italics added by *Poggi*.)

"Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] The determination of the question is vested in the court, not the jury. [Citation.] In performing this task, the court 'necessarily [exercises] some element of discretion . . . .' [Citation.] [¶] Because the second requirement relates to the peculiar facts of the individual case more than the first or third does [citations], the discretion of the trial court is at its broadest when it determines whether this requirement is met." (*Poggi, supra*, 45 Cal.3d at pp. 318-319.)

### C. Analysis

Perez asserts that the trial court abused its discretion by admitting Diana's hearsay statements to her mother on September 23 because the circumstances surrounding these statements fail to show that Diana was incapable of reflecting and fabricating her story during the significant amount of time that elapsed between the end of the alleged startling

event and the time she spoke about it to her mother. He claims that Diana had at least five to eight minutes while she was in the bathroom to come up with the story and even more time since the evidence showed she was alone in her own car during the time it took them to drive separately from SDCC to her home in National City.

As Perez impliedly concedes, Diana's statements to her mother described a two-day assault and kidnapping by Perez, and thus satisfied the requirements that the statements in question relate to the circumstance of the occurrence preceding it and to an incident that was startling enough to have caused nervous excitement. (*Poggi, supra*, 45 Cal.3d at p. 318.) Rather, Perez claims that Diana was no longer under the stress of the startling event when she recounted the strangulation and kidnapping to her mother because their conversation occurred after a substantial amount of time had elapsed.

We agree that a substantial amount of time elapsed between Diana's abduction by strangulation and her return home. Kidnapping, however, is a continuing crime, that " 'continues until such time as the kidnapper releases or otherwise disposes of the victim and [the defendant] has reached a place of temporary safety.' " (*People v. Palacios* (2007) 41 Cal.4th 720, 726.) Here, Diana's kidnapping continued until Perez returned her home, and Perez left Diana's house and reached a place of temporary safety. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 101 [as long as the kidnapper holds the victim, the kidnapper's safety is "continuously in jeopardy" because "[a]t any point in the journey, at any . . . stop[ ] . . . in any unguarded moment, the victim might [manage] to escape or signal for help"].) Although Diana was alone in the car on the way to her house, Perez followed her in another car and was waiting for her when she exited her car. At any

point, Diana could have evaded Perez or even signaled for help. Thus, the kidnapping continued until Perez returned Diana home and Perez made his escape to a place of safety. Minutes after Perez left, Diana was crying and made the challenged statements to her mother. On this record, we conclude that the trial court acted within its discretion in finding that Diana's statements to her mother met the requirements of the spontaneous statement exception.

Nonetheless, even assuming, without deciding, that the trial court erred in admitting Diana's statements to her mother, the assumed error was harmless beyond a reasonable doubt as these statements were cumulative of other properly admitted evidence. Namely, a detective testified that Diana told him about the September incident, and the jury heard Diana's recorded interview with police detailing her abduction by strangulation and subsequent events until Perez returned her home.<sup>6</sup> Additionally, there was ample other evidence demonstrating Perez's history of domestic violence toward Diana prior to her murder. (*Ante*, pt. I.)

Thus, the brief testimony from Diana's mother regarding what Diana told her on September 23 was merely cumulative of Diana's police interview and Perez's history of domestic violence. Any assumed error in admitting Diana's statements to her mother was

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<sup>6</sup> Section 1370 permits hearsay statements that narrate, describe or explain infliction of physical injury or threat of physical injury when the declarant is not available, the statement is made at or near the time of injury, the statement has indicia of trustworthiness, and it was made in writing, electronically recorded, or made to a physician, nurse, paramedic, or law enforcement official. Perez did not challenge the admissibility of Diana's police interview below or on appeal; thus, any claim of error in that regard has been forfeited. (§ 353, subd. (a); *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

harmless beyond a reasonable doubt. (*People v. Blacksher* (2011) 52 Cal.4th 769, 818, fn. 29 ["Even assuming [the declarant's] statements . . . were not spontaneous for purposes of [ ] section 1240, their admission could not have been prejudicial by any standard because they were identical to [other statements properly admitted], and were therefore cumulative."].)

### III. ALLEGED CUMULATIVE EVIDENTIARY ERROR

Perez asserts that, separately and cumulatively, the erroneous admission of domestic violence evidence prejudiced him by depriving him of his constitutional right to a fair trial. A series of trial errors, though harmless when considered independently, may in some circumstances rise to the level of prejudicial, reversible error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Because we have rejected his individual arguments on the merits, we conclude the cumulative error doctrine is inapplicable. (*People v. Watkins* (2012) 55 Cal.4th 999, 1036.)

### IV. ALLEGED PROSECUTORIAL ERROR

#### A. General Legal Principles

"Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law . . . .' " (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*).) "A prosecutor's conduct violates the Fourteenth Amendment of the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due

process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."

(*People v. Morales* (2001) 25 Cal.4th 34, 44.) To establish prosecutorial error during comments made to the jury, appellant must show that " '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*Centeno, supra*, at p. 667.)

We also consider " ' "whether the prosecutor's comments were a fair response to defense counsel's remarks." ' " (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1337; see *People v. Chatman* (2006) 38 Cal.4th 344, 386 ["Defendant's challenges to rebuttal must be evaluated in light of the defense argument to which it replied."].)

## **B. Alleged Misstatement Regarding Voluntary Manslaughter**

### **1. Additional background**

During closing argument the prosecutor stated that the voluntary manslaughter instruction did not apply, explaining that for "voluntary manslaughter, the intentional killing is reduced. That malice, that malice aforethought we had talked about, it is negated. [¶] Now, this does exist in the world, but it only applies in limited circumstances." The court overruled defense counsel's prosecutorial error objection. The prosecutor then explained the circumstances where voluntary manslaughter would apply

by referencing the three elements for voluntary manslaughter set forth in CALCRIM No. 570.<sup>7</sup>

In addressing provocation, the prosecutor stated that Perez needed to act " . . . under the influence of . . . intense emotion. [¶] Now, this passion, it could be any violent emotion, but it needs to have been made, this passion, without due deliberation and reflection." The court overruled defense counsel's misstatement of law objection. The prosecutor then stated:

"I pause on those words because you've heard those words before. Deliberation. Premeditation. Because isn't that really what voluntary manslaughter is? It's basically the opposite of premeditation.

"Premeditation, first degree murder requires that he thought about it beforehand and considered his choices.

"Provocation, voluntary manslaughter on the other side is acting without due deliberation and reflection.

"Now, there—this second element is a subjective component. And what I mean by that, that means what actually [Perez] was feeling. When he killed, he must have been under the actual influence of that passion.

"But here's the third element. This is the objective component. This is what reasonable people would believe. The provocation must have caused an average person to have acted rashly. You decide whether the provocation was sufficient. [Perez] may not set up his own standard of conduct.

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<sup>7</sup> In part, CALCRIM No. 570 provides: "The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."

"So I ask you: Would the provocation cause an emotion so intense that an ordinary person would simply react without due deliberation?"

"An example of when this might be the case. Jane comes home and sees her neighbor John molesting her child. She has an emotion so fierce she doesn't have time to reflect. She reacts. And so as John is walking away, she picks up the vase next to her and she hits him on the head. She simply reacted without reflection."

Defense counsel objected, citing prosecutorial error. The court overruled the objection. Outside the jury's presence, defense counsel complained about the vase example and requested a mistrial. The court denied the request.

## *2. Analysis*

Perez asserts that the prosecutor's argument conflated subjective provocation which can reduce the degree of a murder with the objectively reasonable, adequate provocation needed to negate malice, confusing the two standards and their relationship to premeditation and deliberation. As a result, he claims that the jury likely failed to comprehend the difficult distinctions between the various gradations of homicide. Perez also asserts that the prosecutor distorted the law by arguing that voluntary manslaughter is "basically the opposite of premeditation." He claims this is wrong because voluntary manslaughter requires the negation of malice, not premeditation. He contends that the prosecutor's argument, as a whole, engendered confusion.

We find no prosecutorial error because, in the context of the entire argument and instructions given, it was not reasonably likely that the jury improperly applied the prosecutor's statements in an erroneous manner.

"Murder is the unlawful killing of a human being . . . with malice aforethought." (Pen. Code, § 187, subd. (a).) In contrast to murder, "[m]anslaughter is the unlawful killing of a human being without malice." (Pen. Code, § 192.) Voluntary manslaughter includes the unlawful killing of a human being on a sudden quarrel or heat of passion. (Pen. Code, § 192, subd. (a).) In *People v. Rios* (2000) 23 Cal.4th 450 (*Rios*), our high court provided an in-depth analysis of the difference between murder and voluntary manslaughter. " 'Generally, the intent to unlawfully kill constitutes malice. [Citations.] 'But a defendant who intentionally and unlawfully kills [nonetheless] lacks malice . . . when [he] acts in a 'sudden quarrel or heat of passion' ([Pen. Code,] § 192, subd. (a))" " . . . . [¶] These mitigating circumstances reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by *negating the element of malice* that otherwise inheres in such a homicide [citation].' [Citation, italics in original.] *Provocation* has this effect because of the words of [Penal Code] section 192 itself, which specify that an unlawful killing that lacks malice because committed 'upon a sudden quarrel or heat of passion' is voluntary manslaughter." (*Id.* at p. 460.)

Perez is correct that voluntary manslaughter is different from murder because the element of malice is lacking. Here, the prosecutor correctly informed the jury of this concept. She told the jury that for voluntary manslaughter an intentional killing is reduced because the element of malice is negated. She then stated that voluntary manslaughter applies only in limited circumstances, referencing the three elements for voluntary manslaughter set forth in CALCRIM No. 570. The trial court properly overruled Perez's objection to the prosecutor's statement that voluntary manslaughter

"does exist . . . but it only applies in limited circumstances" because this assertion tracks what our high court stated in *People v. Lasko* (2000) 23 Cal.4th 101, namely that "[a] defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances . . . .'" (*Id.* at p. 108.)

The trial court also properly overruled Perez's objection to the prosecutor's statement that provocation requires an intense or violent emotion made without due deliberation and reflection. This statement directly tracked a portion of CALCRIM No. 570: "Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection."

After these correct arguments, the prosecutor stated that voluntary manslaughter is "basically the opposite of premeditation." Perez correctly points out that voluntary manslaughter requires the negation of malice, not the negation of premeditation. However, we discern no possibility that the jury could have been confused by this brief statement because the prosecutor previously stated that for voluntary manslaughter malice is negated. The prosecutor then properly explained that voluntary manslaughter required provocation, acting without deliberation and reflection, and properly noted the subjective and objective components of voluntary manslaughter.<sup>8</sup>

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<sup>8</sup> Heat of passion for voluntary manslaughter has both a subjective and objective component: (1) The defendant must have killed while actually in the heat of passion induced by the provocation, and (2) the provocative conduct must be such that a reasonable person would have reacted rashly or without due deliberation and reflection. (*People v. Moya* (2009) 47 Cal.4th 537, 549-550.)

The prosecutor's argument regarding voluntary manslaughter was not objectionable or confusing. But even assuming *arguendo* that the prosecutor misstated the law, we would find no prejudicial error. The trial court properly instructed on murder, first and second degree murder, and voluntary manslaughter. (CALCRIM Nos. 520, 521, 570.) Jurors were also instructed that they were to follow the trial court's instructions on the law and ignore any contrary argument by counsel. (CALCRIM No. 200.) Having been so instructed, it is unlikely that the jury construed the prosecutor's argument in an objectionable fashion.

Next, Perez contends the prosecutor misstated the law by using a hypothetical about child molestation to illustrate heat-of-passion voluntary manslaughter. Perez does not contend that the hypothetical facts used by the prosecutor did not show voluntary manslaughter. Instead, he argues that the hypothetical was too similar to the hypothetical found improper by the court in *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*) because it implied that the kind of provocation deemed adequate for voluntary manslaughter must rise to witnessing or experiencing such a level of incendiary or despicable conduct. He claims that the jury likely understood the prosecutor's vase hypothetical in the same problematic way that the *Najera* court deemed unacceptable.

In *Najera, supra*, 138 Cal.App.4th 212, the prosecutor argued: " 'You think there's an intruder in the house. Your son or daughter is yelling for help. You grab that gun and go into that bedroom of your son or your daughter, and lo and behold, what do you see? You see somebody molesting your child, God forbid. And what do you do? You pull out your gun and you shoot that person who's molesting your child. [¶] That is a voluntary

manslaughter. That's the kind of case that the law says, even though the elements of the murder are there, you intended to kill this person, but the circumstances are such that, you know what? We're going to give you a bone, if you will, and it's going to be reduced to voluntary manslaughter because it's sudden quarrel, heat of passion. You're so inflamed, as a reasonable person would be in that same situation, that you killed this person that's molesting your child.' " (*Id.* at pp. 221-222.)

The *Najera* court held that "[t]he killing in the example appears to be justified under Penal Code section 197, subdivision 3 because it would have been committed in the lawful defense of a child and there was a reasonable ground to apprehend a design to commit a felony or inflict great bodily injury. The prosecutor's example thus overstated the level of provocation needed to arouse heat of passion sufficient to negate malice, suggesting that circumstances justifying homicide under Penal Code section 197 are necessary to inflame the reasonable person." (*Najera, supra*, 138 Cal.App.4th at p. 222.)

The hypothetical used by the prosecutor in this case, while similar to the one in *Najera*, did not involve a killing committed *during* a child molestation. Rather, the molestation had ended and the perpetrator had walked away when the killing occurred. Thus, the hypothetical here did not involve a justified homicide committed in the defense of others. (See Pen. Code, § 197, subd. (3).) Perez argues that "[r]egardless of the hypothetical's hyper-technical correctness or not, using it in this context and in the face of published precedent disapproving an essentially similar variant of it, amounted to a reprehensible method of trying to persuade the jury by confusing it about the law."

To the extent that the hypothetical here could be erroneously construed to suggest that circumstances making a homicide lawful (defense of others) are necessary to constitute adequate provocation, Perez has not shown a reasonable likelihood that the jury misapplied the law because of the prosecutor's hypothetical. The prosecutor's argument made it clear that voluntary manslaughter requires "any" violent or intense emotion that causes a person to act without due deliberation and reflection. Defense counsel reiterated this point during her closing argument, and the trial court instructed the jury on this point. We presume that the " 'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' " (*People v. Seaton* (2001) 26 Cal.4th 598, 646.) We therefore reject Perez's claim of prosecutorial error.

### *C. Alleged Misstatement Regarding Burden of Proof*

#### *1. Additional background*

During rebuttal, the prosecutor told the jurors " . . . your duty is to be reasonable, looking at circumstantial evidence—" The court overruled defense counsel's misstatement of law objection. The prosecutor then stated that in " . . . determining whether or not I have proven my burden beyond a reasonable doubt, you use reason, you use logic. And you, not me, not [Perez], you decide the facts."

Outside the jury's presence defense counsel argued that being reasonable is not enough to satisfy the burden of proof beyond a reasonable doubt. The court rejected the objection and denied defense counsel's request for a mistrial.

## 2. *Analysis*

Perez complains that the prosecutor misstated the jury's duty when evaluating evidence under the reasonable doubt standard, thereby lessening the People's burden of proof. He asserts that these improper arguments resulted in a fundamentally unfair trial that deprived him of his federal constitutional right to due process. Specifically, he claims the prosecutor misled the jury "by implying it must merely believe a conclusion based on the circumstantial evidence would be reasonable, using reason and logic, in order to find she had satisfied her burden."

We find no prosecutorial error because, in the context of the *entire* argument and instructions given, it was not reasonably likely that the jury improperly applied the prosecutor's rebuttal statements in an erroneous manner. During closing argument the prosecutor told jurors that she had the duty to prove the charges and allegations beyond a reasonable doubt. Defense counsel reiterated this point in her closing argument. The court properly instructed the jurors that the People are required to prove their case beyond a reasonable doubt (CALCRIM No. 220) and that "[t]he People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (CALCRIM No. 570.) The jurors were also instructed to follow the trial court's instructions on the law and ignore any contrary argument by counsel. (CALCRIM No. 200.) We presume the jurors followed the court's instructions. (*Edwards, supra*, 57 Cal.4th at p. 746.)

## V. ALLEGED ERROR DURING VOIR DIRE

### A. General Legal Principles

"Challenges for cause are constitutionally guaranteed under the Sixth Amendment." (*People v. Black* (2014) 58 Cal.4th 912, 916 (*Black*).) "[C]riminal defendants are allowed an unlimited number of challenges to prospective jurors for cause, which the defendants must use before exercising any peremptory challenges." (*Ibid.*; Code Civ. Proc., § 226.) Challenges for cause may be based on "[g]eneral disqualification," "[i]mplied bias," or "[a]ctual bias." (*Black*, at p. 916; see Code Civ. Proc., § 225, subd. (b)(1).)

"[T]he right to peremptory challenges is statutory." (*Black, supra*, 58 Cal.4th at p. 916; Code Civ. Proc., § 231, subd. (a).) Peremptory challenges "are merely 'a means to achieve the end of an impartial jury.' " (*Black*, at p. 917.) Thus, the "[m]ere loss of a peremptory challenge does not automatically constitute a violation of the federal constitutional right to a fair trial and impartial jury. [Citation.] If no biased or legally incompetent juror served on defendant's jury, the judgment against him does not suffer from a federal constitutional infirmity, even if he had to exercise one or more peremptory challenges to excuse prospective jurors whom the court should have excused for cause." (*Id.* at p. 917.)

A trial court has broad discretion to assess juror qualifications. (*People v. Weaver* (2001) 26 Cal.4th 876, 910.) Trial courts "should sustain a challenge for cause when a juror's views would 'prevent or substantially impair' the performance of the juror's duties in accordance with the court's instructions and the juror's oath. [Citations.] On appeal,

we will uphold a trial court's ruling on a challenge for cause by either party 'if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.' " (*People v. McDermott* (2002) 28 Cal.4th 946, 981-982.) "We defer to trial courts when they dismiss potential jurors based on their equivocation and demeanor" because that court had the opportunity to assess the individual. (*People v. Spencer* (2018) 5 Cal.5th 642, 662.)

#### *B. The Voir Dire Process*

Defense counsel challenged eight prospective jurors for cause. The court granted two of the challenges. It denied the remaining six challenges for cause. Defense counsel exercised peremptory challenges to excuse three of the challenged jurors. The prosecution later used a peremptory challenge to remove a prospective juror that the defense had unsuccessfully challenged for cause. The defense exhausted its allotted peremptory challenges.

The next day, defense counsel requested an additional peremptory challenge, but the trial court denied the request. When voir dire resumed, both sides ultimately accepted the panel of 12 jurors, and the selection of alternate jurors commenced. The court began this phase of voir dire by first asking each side about the prospective alternate jurors whom the attorneys had already questioned. Through that process, defense counsel had a prospective alternate juror excused that she had unsuccessfully challenged for cause.

After screening additional venirepersons, the court denied defense counsel's challenge for cause to prospective alternate juror No. 89. The trial court later denied

defense counsel's request for another peremptory challenge. The court empaneled prospective alternate juror No. 89 as one of four alternate jurors.

### C. *Analysis*

Perez contends that the trial court erroneously denied his for-cause challenges to three prospective jurors and alternate juror No. 89. Based on these alleged errors, he complains that he was forced to use his peremptory challenges on these individuals and should have been given more challenges. Perez does *not* challenge the competency of the 12 jurors who actually decided his case. Rather, he argues that the trial court's erroneous denial of his for-cause challenges to three prospective jurors resulted in his acceptance of a *biased alternate juror*.

Under these circumstances, Perez's "right to an impartial jury is affected only when he exhausts his peremptory challenges and an incompetent juror, meaning a juror who should have been removed for cause, *sits* on the jury that decides the case." (*Black, supra*, 58 Cal.4th at p. 920, italics added.) Accordingly, Perez admits (as he must) that to establish an impairment of his constitutional rights, he needs to demonstrate that the trial court erroneously denied at least one of his challenges for cause and his requests for an additional peremptory challenge, and that alternate juror No. 89, "qualifies as a 'sitting juror' notwithstanding his status an alternate juror."

Assuming, without deciding, that the trial court erroneously denied Perez's three for-cause challenges and his requests for an additional peremptory challenge, Perez cannot show that an incompetent juror sat on the jury that decided his case. Although Perez posits that an alternate juror qualifies as a sitting juror, he provided no argument or

authority to support this contention. While we may treat the argument as forfeited (*People v. Stanley* (1995) 10 Cal.4th 764, 793), we decline to do so.

Alternate jurors are defined by statute as "one or more additional jurors" called by the court immediately after the jury is impaneled and sworn. (Pen. Code, § 1089.) Although the term "sitting jurors" is not statutorily defined, numerous California Supreme Court cases differentiate between "sitting jurors" and "alternate jurors." (See, e.g., *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 59 [Penal Code section 1089 authorizes "trial courts to replace a sitting juror with an alternate."]; *People v. Thornton* (2007) 41 Cal.4th 391, 460-461 [replacing a sitting juror with an alternate]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1037 [discussing case where sitting juror was erroneously excused in favor of an alternate].) These cases make clear that an alternate juror does not qualify as a sitting juror unless and until the alternate is called upon to replace a sitting juror. Accordingly, under *Black, supra*, 58 Cal.4th 912, Perez's argument fails because the allegedly biased alternate juror did not decide his case. (*Id.* at p. 920.)

Recognizing that *Black, supra*, 58 Cal.4th 912 dooms his argument, Perez submits that we should reexamine the majority opinion in *Black* based on the observations of Associate Justice Liu's concurrence in *Black*. Specifically, he claims we should assess prejudice based on whether the trial court's rulings disadvantaged his defense. The doctrine of stare decisis, however, requires that all lower courts follow decisions of higher courts within their jurisdiction; thus, we are bound by the holding in the majority opinion in *Black* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

In any event, in *People v. Rices* (2017) 4 Cal.5th 49, our high court followed *Black* and *unanimously* concluded that the defendant did not show prejudice even assuming the trial court should have removed three prospective jurors for cause. (*Rices*, at p. 76.) The court held, "Defendant does not demonstrate that any sitting juror was biased and should have been excused for cause. Accordingly, he has not shown prejudice even if we assume the court should have granted the challenges for cause to the three prospective jurors." (*Id.* at p. 77.)

Thus, even assuming the trial court erred during jury selection, we reject Perez's argument that the trial court's assumed errors denied him the right to an impartial jury.

#### DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.